

SERVED: August 15, 2008

NTSB Order No. EA-5403

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. § 800.24)
on the 15th day of August, 2008

_____)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17547
v.)	
)	
TOMMY HUE NIX,)	
)	
Respondent.)	
_____)	

ORDER DENYING MOTION FOR RECONSIDERATION
OF ORDER DENYING STAY AND
DENYING PETITION TO STRIKE LAW JUDGE'S
WRITTEN ORDER ON REMAND

Respondent has filed a motion for reconsideration of the Board's order denying a stay of an order issued on remand by Administrative Law Judge William A. Pope, II, served March 25, 2008. Respondent filed this motion while awaiting disposition of a petition for review, filed in the United States Court of Appeals for the Fifth Circuit, of the Board order initially remanding the case to the law judge. In NTSB Order No. EA-5374, the Board remanded the case for further findings and explanation.

The law judge had earlier dismissed the Administrator's order suspending respondent's commercial pilot certificate for violations regarding air carriers and operations for compensation or hire under 14 C.F.R. parts 119 and 135. The suspension order also alleged a violation of § 91.17(b), operating a flight with persons who appeared to be intoxicated. The Administrator did

not appeal the dismissal of the part 119 and 135 allegations, but did appeal the dismissal of the § 91.17(b) violation. On remand, the law judge affirmed that allegation, and reduced the sanction from a 180-day suspension to 30 days.

A timeline will help in understanding the sequence of procedural events:

July 26, 2005	The Administrator issued an order of suspension for violation of parts 119 and 135, and § 91.17(b); 180-day suspension of commercial pilot certificate.
August 23, 2007	In his oral initial decision, the law judge dismissed the complaint.
August 27, 2007	The Administrator appealed the law judge's finding that § 91.17(b) was "inapplicable."
March 24, 2008	The Board remanded the case to the law judge.
March 25, 2008	In his written order on remand, the law judge granted the Administrator's appeal with regard to the § 91.17(b) violation, but modified the sanction to 30 days.
April 21, 2008	Respondent petitioned the United States Court of Appeals for the Fifth Circuit to review the Board order that remanded his case to the law judge.
May 16, 2008	Respondent submitted a motion to the Board to stay the suspension of his airman certificate pending review by the Fifth Circuit.
June 27, 2008	The Board denied respondent's request for stay.
July 14, 2008	Respondent submitted a motion for the Board to reconsider its denial of his request for stay, and petitioned the Board to strike the law judge's order issued on remand.

The Board's rules of practice state that the law judge's initial decision or appealable order becomes final with respect to the parties if no appeal from the initial decision or appealable order is timely filed. See § 821.43. Thereafter, no request for stay pending judicial review will be entertained if it is received after an order's effective date. See § 821.64(b). The law judge's written order on remand was served on March 25, 2008. In order to be timely appealed to the Board, respondent had to file an appeal of that order on or before April 4, 2008. In the absence of a timely appeal to the Board (which is also necessary for respondent to have exhausted his administrative

remedies), the law judge's order became final on April 5, 2008. The Board declined to entertain respondent's May 16, 2008 motion to stay the law judge's order, and denied respondent's request.

Respondent now seeks reconsideration of the denial of his request for stay, arguing that his petition for review of the March 24, 2008 remand to the law judge, filed with the United States Court of Appeals for the Fifth Circuit on April 21, 2008, rendered the law judge's March 25, 2008 order "void ab initio." Respondent also petitions the Board to strike the law judge's written order on remand, arguing that respondent's April 21, 2008 petition for review divested the Board of jurisdiction.

Unfortunately for respondent, however, the Board order that he petitioned the Fifth Circuit to review was not a final order eligible for review by a United States Court of Appeals. See 49 U.S.C. §§ 1153 and 46110; 5 U.S.C. § 704; Exxon Chemicals America v. Chao, 298 F.3d 464, 466-67 (2002); American Airlines v. Herman, 176 F.3d 283, 289 (5th Cir. 1999); Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 906-08 (1982). In fact, the Fifth Circuit has apparently recently dismissed respondent's petition for review based on his failure to exhaust his administrative remedies. By failing to appeal the law judge's order on remand, and instead appealing the Board's order remanding the case to the law judge, respondent allowed the law judge's order to become final. Therefore, when he requested a stay of the law judge's order, the request was denied. See Administrator v. Nix, NTSB Order No. EA-5392 (2008). There is no further case or controversy before the Board.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's motion and petition are denied.

Gary L. Halbert
General Counsel